SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~526~~ 6

AL HARRIS, PETITIONER,

v.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

On Appeal From the United States District Court for the Southern District of New York.

Appellant's Appendix

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CRIMINAL DOCKET

63 CR 664

THE UNITED STATES,

—vs.—

AL HARRIS.

CRIMINAL CONTEMPT OF COURT BY REFUSING TO ANSWER QUESTIONS BEFORE GRAND JURY

DOCKET ENTRIES

DATE	PROCEEDINGS
8- 8-63	Hearing begun and concluded on 8-8-63 to compel the witness Al Harris to answer questions. The witness refuses to answer the questions after having been directed to do so by the Court. Gov't moves to punish witness for wilful refusal to answer the questions. Motion Granted. Witness Al Harris adjudged in contempt of Court. The Court directs that the witness be sentenced to One (1) Year. Bail pending appeal fixed in the sum of $10,000. Deft. remanded. McLean, J.
8- 9-63	Filed Order, Certificate & exhibit, dated 8-9-63, that pursuance of Rule 42(a) of the FRCP, the defendant Al Harris is found to be guilty of contempt of this Court, and is hereby committed to the custody of the Attorney General for imprisonment for a period of One (1) Year. McLean, J.

[fol. 2]

DATE	PROCEEDINGS
8- 9-63	Issued Certified copies of order of commitment to the U.S. Marshal.
8- 9-63	Filed Bail Bond for $10,000., dated 8-8-63 by Public Service Mutual Insurance Co. pending appeal to U.S.C.A.
8- 9-63	Filed Notice of Appeal to U.S.C.A.
8-16-63	Filed Remand, dated 8-8-63. McLean, J.—with Endorsement—"Released on bail this 8th day of August 1963" Sweeney, Dep. Clerk
10- 3-63	Filed Affidavit, Consents & Order extending the Deft's bail limits. Weinfeld, J.

[fol. 3]

Grand Jury Minutes

August 7, 1963

Re: Al Harris
Mr. Maloney

Grand Jury in Court Session before
Judge McLean, U.S.D.J.

APPEARANCES:

Andrew J. Maloney, Assistant United States Attorney.

Moses Polakof (at point indicated), Attorney for Mr. Al Harris.

Al Harris (at point indicated), Witness.

Mrs. Raimonde Kass (at point indicated), G. J. Reporter. Date: August 7, 1963.

G. J. Steno: M. T. Connolly

Mr. Maloney: Good morning, Your Honor. If Your Honor please, the Grand Jury this morning is here to seek your aid in a matter involving a violation of the Federal Communications Act. A witness by the name of Al Harris was sworn this morning and questioned and directed to answer certain questions to which he holds his privilege. Even though he was informed that the Grand Jury was granting him immunity under 409(1), he persisted in refusing to answer the questions. I would ask Your Honor now to permit the Grand Jury Stenographer to read the minutes to understand the issues before the court.

Judge McLean: This is the same matter we had last week.

[fol. 4] Mr. Maloney: That's correct, sir.

Judge McLean: As I understand it, I think that Mr. Harris should be present and his counsel should be present, and these questions read and these questions discussed. I take it the Grand Jury has no objection to revealing to Mr. Harris' counsel what these questions were. Is that right?

Foreman: No, I have no objection, Your Honor.

Judge McLean: I will direct his counsel, as I did last week. Very well, have him come in.

(Witness and his attorney, Mr. Polakof are brought into the court room.)

Mr. Maloney: If Your Honor, please, may the record reflect that Mr. Polakof is present along with Mr. Harris, and might I inquire of Mr. Polakof whether he appears here as the attorney for Mr. Harris.

Mr. Polakof: Your Honor, may I state my position to Your Honor. I don't know this witness. I never met him prior to my appearance before Your Honor last Thursday, —I met him Wednesday night—at that time I appeared. He was referred to me by an attorney, I assume. The attorney called me up and said, "Please appear with him and then arrange for your fee." I appeared with him and after my appearance before Your Honor on Thursday I

conferred with him in my office and told him my suggested fee. When I appeared before Your Honor last Thursday it was really for the purpose of obtaining an adjournment to determine whether or not I appear for him.

You realize it was very short notice. Your Honor was kind enough to explain the situation. I was here and it didn't involve too much argument on my part, and Your [fol. 5] Honor dismissed the proceedings, and now it is starting all over.

I met with the defendant and he is without funds. I'm a single practitioner. I have other engagements. In fact, at the time of Mr. Maloney's phone call when he requested my appearance, I cancelled a very important luncheon appointment. So, in the first place, I would like to be relieved of the position as counsel. The witness has informed me that if he had some time, a week or two, he thinks he can raise the money by borrowing it. As the result of my appearance here—as long as I'm here—I'll gladly do it without compensation but, as I study the situation, this is going to be—probably will involve contempt. It will involve appeals, not only to the Court of Appeals but, perhaps, the Supreme Court of the United States. I have spent considerable time studying the law but not enough to be in a position to argue it as fully as I would like to.

I have studied the *Marcus* case and the *Brown* case. It's my considered opinion that the immunity statute is being misapplied. I have read Section 203(c), the Communications Act, several times. How that could possibly involve —how this witness could possibly give any testimony that would involve the fixing of rate schedules and phone service is beyond my comprehension. I saw nothing in 203(c) that could possibly involve this witness.

In the *Brown* case it involved the Commerce Department. That was—the statute there, I believe, was passed, I believe, in 1934. It's the same statute you have in the Sherman Law and Interstate transportation. The *Brown* case clearly shows—on the question as I understand it—investigating trucking in interstate commerce; whether or not the trucker had obtained or applied for a license.

[fol. 6] Judge McLean: I think now we're coming into the merits.

Mr. Polakof: I just want, Your Honor, to know I spent some time. I do recall in the *Brown* case that the Court of Appeals consistently stated that the defendant was given considerable time to obtain an attorney and the advice of an attorney, and it's my suggestion, Your Honor, that this matter be determined so that he may retain counsel.

Mr. Maloney: Your Honor, I think the best way to hear from the government is to hear this transcript which I believe will solve many of the problems raised by counsel; and just one small argument I would just make in reply to counsel: whether or not counsel or the witness sees any remote possibility of his being involved into violations of 203(c) or 501 of Title 47 has no merit. This Grand Jury is asking assistance and he is not in any position to test the relevancy or the nature of the proceedings and where they may lead. Now, without further to-do, your Honor, may I now swear in the stenographer and read the transcript?

Judge McLean: Not just yet. You appreciate, Mr. Polakof, that I want to get on with this proceeding.

Mr. Polakof: I do, sir.

Judge McLean: I suggested to Mr. Harris last week that he get a lawyer. He was wise enough to get you. You came down here and had a discussion with us last week in which you say I would not go ahead on that record but that I anticipated that the United States attorney would start again, and that would give both you and me a further time to look into the cases; and I see you have done that, from what you have said, —that you have to some extent, —and I would like to have you stay in this, at least through this stage.

Mr. Polakof: Well, Your Honor, I'm here. If Your [fol. 7] Honor wants me to stay now for this particular proceeding, I will acquiesce to Your Honor's wishes.

Judge McLean: I appreciate that because you're an experienced lawyer and will give the witness the representation. I don't want to hold everything up while he tries to find another lawyer, so I appreciate it if at my request you continue to represent him at this point. What you do in the future, at some future point, isn't something you

immediately decide now. I hope there won't be any future point after we go over this this morning.

Now, on that understanding Mr. Polakof is going to represent Mr. Harris at present, at any rate, at the Court's request. You can go ahead and have the Grand Jury Stenographer read the questions asked Mr. Harris today and I'll ask Mr. Polakof, as I did the last time, to keep this confidential because this is a Grand Jury room, a Grand Jury proceeding. You're the only person who isn't connected with the Grand Jury who is here.

Mr. Polakof: I assure you I'll keep it confidential with one exception. It may be necessary for me to advise another lawyer what transpired.

Judge McLean: Another lawyer. Now, I suggested to you last time, Mr. Maloney, that you put in evidence or mark in some way the subpoena.

Mr. Maloney: It's already been done, Your Honor, as Your Honor will see from the transcript.

Judge McLean: May I see it now.

(Mr. Maloney hands Judge a paper.)

You might show this to Mr. Polakof.

Mr. Polakof: I've seen it.

Mr. Maloney: May the record reflect that the Court and [fol. 8] Mr. Polakof are referring to Grand Jury Exhibit 1 of this date.

Judge McLean: I assume so. I don't see any mark on it.

(Mr. Maloney points something out to the Judge.)

Judge McLean: Oh, yes.

Mr. Maloney: May the witness be sworn, Your Honor, the Stenographer, Your Honor.

Judge McLean: You're the Grand Jury Stenographer.

Mrs. Kass: Yes, Your Honor.

Mr. Maloney: Mr. Foreman, will you please swear in the witness.

(Witness Raimonde S. Kass is then duly sworn by the Foreman of the Grand Jury.)

Q. Will you please state and spell your name for the record?

A. My name is Raimonde S. Kass (spelled).

Q. By whom are you employed?

A. By the Department of Justice, Southern District of New York.

Q. In what capacity?

A. As a Grand Jury Reporter.

Q. And were you so employed this morning in the Grand Jury room when Mr. Harris appeared as a witness?

A. Yes, I was.

Mr. Maloney: Would you please mark this Grand Jury Exhibit #2, of this date. (So marked.)

Q. I show you what has been marked Grand Jury Exhibit 2 of this date and I ask you can you identify it?

A. Yes.

Q. What is it?

A. They're the minutes of the examination of Mr. Al Harris taken this morning.

Q. Now, with Your Honor's permission may the witness read Grand Jury Exhibit 2.

Judge McLean: Yes.

[fol. 9] Q. Would you speak up in a loud voice so that every member of the Grand Jury as well as the stenographer can hear you.

(Witness reads entire Exhibit 2.) See attached.

Mr. Maloney: That, Your Honor, I believe completes the testimony of this witness before this Grand Jury this morning.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Polakof: May I have one statement cleared up, Your Honor. I do not know Mr. Panzer. For the record, Mr. Panzer did not recommend this witness to me.

Judge McLean: Mr. Polakof said something a while ago about he didn't understand how Section 203 of Title 47 could possibly be involved. I understand there is a theory on that. Will you tell us, Mr. Maloney?

Mr. Polakof: Your Honor, I think we have to go by the record.

Judge McLean: I want to ask Mr. Maloney to explain this so you understand.

Mr. Maloney: Well, Your Honor, it is a violation to use interstate wire facilities to engage in wagering or to promote an unlawful activity such as gambling. Just exactly where and who will be involved in the current investigation before the Grand Jury, of course, the Grand Jury does not know. It does not have a crystal ball. But this witness as well as others who are not connected with any telephone company certainly could be named under Section 2 of Title 18, as aiders and abettors in the fixing of rates or in connection with this very violation of Section 203(c) and Section 501 of Title 47.

Judge McLean: That has nothing to do with the fixing of rates.

Mr. Maloney: No, Your Honor. It has, dealing with just [fol. 10] promoting unlawful activity on a wire communication which would be a violation.

Judge McLean: Is not the theory by which Section 203(c) is invoked in these cases that when a person uses the telephone for some illegal purpose such as gambling he is causing the telephone company to violate the schedule of rates and carriers and so forth which expressly say that the phone shall not be used for those purposes?

Mr. Maloney: That's correct, your Honor.

Judge McLean: And isn't that the theory on which the court proceeded in the Marcus case?

Mr. Maloney: That is exactly right, sir.

Judge McLean: Now, Mr. Polakof may not agree, but I think that's why this section appears.

Mr. Polakof: May I be heard, Your Honor?

Judge McLean: First we'll see if Mr. Maloney has anything more he wants to present.

Mr. Maloney: Might I say, Your Honor, I think, perhaps, we are getting off the real issues before Your Honor, and the real issues here are, number one, is this Grand Jury conducting a proceeding for violation of the Federal Communications Act, and on the record, it is; Number two, if so, has Your Honor the power to grant immunity? I call upon Your Honor—I direct Your Honor's attention to Section 409(1) which sets forth that the Grand Jury does have

such power and which the Grand Jury did do in the Marcus case, 310 F. (2d) 143.

Just how the witness fits into this full conspiracy, that is not an issue before this Court. What his complete part in it is, the Grand Jury wishes to find out. In return for this the Grand Jury is giving him the extraordinary privilege of immunity. Really, I don't understand just what he has to complain of. As any citizen has, he has a duty to [fol. 11] testify. Balanced against this, as I said before to Your Honor, is his privilege under the Fifth Amendment. Now, this Grand Jury has shifted that balance by granting him immunity in its proceeding. I cannot see in any way how he's prejudiced by directing him to answer these questions in order to assist the Grand Jury in its investigation of violations of the Federal Communications Act.

Judge McLean: Are you finished?

Mr. Maloney: Yes, Your Honor.

Mr. Polakof: In the first place, Your Honor, it's elementary. The designation of a section in a Grand Jury's subpoena or even in an indictment is not the controlling factor. Your Honor knows that after every indictment, in brackets there's a quotation of the Section and the law is well established that if it's a misquotation it doesn't invalidate the indictment. I submit most respectfully to Your Honor that neither Your Honor nor the Grand Jury has the power to grant immunity except where authorized by Congress. That's elementary. The fact that this subpoena refers to Section 203(c) is disproven by questions put to this witness. This is a violation of Section 1952 which makes it a crime to use telephones, travel or other means to promote gambling in interstate commerce. It is my considered opinion that several bills have been offered to Congress prior to the passage of 1952 in 1961 with an immunity section, and Congress has not seen fit to pass those bills, and I rely on recollection before Your Honor. This would involve a search of the Library of Congress because the U.S. Code includes only reference to the bills that were passed. Now, in 1962, Section 1954 was added to that Title and there Congress saw fit under certain safeguards—it also deals with [fol. 12] the racketeering part of the Code—to authorize

immunity under certain circumstances, I think, with the approval of the Attorney General.

Now, the *Marcus* case is distinguishable, Your Honor, very clearly distinguishable. In the *Marcus* case the witness had made a complaint to the Public Service Commission that he was denied telephone service. That's the complaint they were investigating clearly within the purview of the Communication Act.

The best proof that this is a violation of Section 1952 is the fact that the Assistant warned the witness that any answer that he may give,—that he may refuse to answer any question that would incriminate him. That is not necessary under 501 of the Communications Act, nor is it necessary under the Sherman Law or the Commerce Law. However, it is necessary under the immunity acts that have been passed since, the Securities and Exchange Act, the Narcotic Act and other acts. Assume, Your Honor, that the use of a telephone was made to set up a murder. Would the witness be given immunity because he used a telephone and then stated, yes, he knows who did it? This is a dangerous precedent. That's why Congress refused to give the prosecuting authorities or the Grand Jury the right to give immunity generally.

If what Your Honor says is true we don't need any further immunity sections because in any crime under Title 18—and I think there are two thousand sections of law—if a telephone is used to make a call, that would come under the Commerce clause, as the Assistant attempts to allege. That is not the fact and I think that this witness was entirely within his rights in refusing to answer any questions, particularly after he had been warned that he may do so.

[fol. 13] Judge McLean: It made a little fire under you when he asked a question about you.

Mr. Polakof: That's stupid, Your Honor; but these are not intelligent people. He was in my office this morning, Your Honor, and I offered him gratuitous advice—well, just as a creditor, or maybe I'm a softie—and I tried to guide him. That's why he needs an attorney outside and that's why the law gives him the right to tell the Grand

Jury he would like to go out to consult his attorney. That's silly, but that shows they get imbued with an idea and they follow it through with ridiculous questions, but that's happened before, Your Honor, and it's happened to smart people.

Judge McLean: Your point is, I take it, that inasmuch as gambling is involved and Section 1952 of Title 18 is involved that any immunity that this man could enjoy would have to be something given by that Section?

Mr. Polakof: No, Your Honor.

Judge McLean: Isn't that your point?

Mr. Polakof: No; that's part of it but I go further because 1952 does not offer it. I go further and I say this is not an investigation of the Communication Act in any form, shape or manner, and it's an abuse; it's a misapplication of law, and the mere fact that the subpoena gives one section doesn't make it so because the questions put to the witness are clearly one of gambling, and Your Honor's theory that if, if a phone was used to make a call and if the Telephone Company knew about it—and you're going far afield—that may have been a violation; or are you saying that if the Telephone Company gave these people the right to use the phone knowing—which is far fetched—that it may be used to make a gambling call, that would come under 47? I don't see that, respectfully, Your [fol. 14] Honor. I don't see anywheres in 47 any statement in the entire book that says that a phone call may not be made for gambling purposes.

Judge McLean: I have no theory. I was merely trying to elicit the government's theory. What I stated that I understood the government's theory to be is also what I understood the Court to be talking about in the *Marcus* case.

Mr. Polakof: If you will look at the *Marcus* case, if you have it, Your Honor, you will see that this witness made a complaint that he was denied telephones. Now, I think that the Telephone Company being a public service company must grant it to everyone who applies. Apparently the Telephone Company rejected it. Now, the inquiry was, was the rejection correct or did the Telephone Company abuse the section?

Judge McLean: Where did you find out this interesting information about the *Marcus* case. Is that in the record?

Mr. Polakof: Yes, sir.

Judge McLean: It's not in the opinion. Do you have the record.

Mr. Polakof: I think it's in the opinion. An associate—not an associate, but I had to use the services of a former assistant, a young man, to go to the library and do some research for me, but I think you will find in the record that he was informed that he was questioned did he make a complaint in 1955 to the Massachusetts Public Service Commission to the effect that he was denied the use of telephones.

Mr. Maloney: Your Honor, please.

Mr. Polakof: Am I correct?

Judge McLean: Just a minute, Mr. Maloney. The opinion, if that's what we're talking about—

[fol. 15] Mr. Polakof: Yes.

Judge McLean: —in the *Marcus* case that said—page 145 of 310 F. (2d)—that the witness was asked if he had been investigated by the Massachusetts Crime Commission and whether he had appealed to the Massachusetts Public Utilities Commission because the Telephone Company had refused to install twelve telephones in his office—is that what you have reference to?

Mr. Polakof: That's correct, Your Honor.

Judge McLean: I don't find anything else in the opinion that indicates the Grand Jury was investigating the telephone company.

Mr. Polakof: But the question indicates that at least there was a materiality that they could be inquiring. That's the question they put to him, "Did you make a complaint to the Public Service Commission?" Well, if he made a complaint that would come within the purview of 47, Title 47, it's apparent. In the *Brown* case the only questions asked had to do with interstate trucking. They never got to the other point.

Mr. Maloney: If Your Honor please, without trying to be facetious or too blunt, I believe counsel's distinction is

rather absurd to believe that in order to grant such immunity under Section 409(1) a proceeding would have to start just as it happened to start in *Marcus*, but I think *Marcus* at page 147 states very succinctly in the right hand column—I'll just read those two sentences: "Was the proceeding one involving the Communications Act? Obviously the Grand Jury under its general powers could investigate within a wide field dealing with violations of many statutes including the Communications Act."

Your Honor, that's all we're doing here this morning. The Grand Jury is investigating into violations of the Federal Communications Act. The Marcus case tells us—indeed, [fol. 16] the statutes tell us—once the proceeding is started, this Grand Jury has the power to grant immunity. That's the only issue before the court, and going into whether or not this might lead into an indictment of the 1952 or not, counsel is without standing.

In Levine of this Circuit which was a contempt proceeding in which the same issue was raised, the Court of Appeals held that counsel was without any standing to inquire into the purpose or nature of the proceeding when directed to answer questions. Your Honor, I believe the issues are simple. The Marcus case is on all fours, and I would ask Your Honor to aid this Grand Jury in directing the witness to answer the questions that were put to him.

Mr. Polakof: I just want to repeat one thing, Your Honor. The Grand Jury cannot usurp the functions of Congress. If that's so, we need—you need no immunity statute.

Judge McLean: Well, as I said last week, I want to be sure that if I direct this witness to answer he will receive the immunity which I'm confident the Grand Jury intends in good faith to confer upon him; and the only question is whether or not this statute, 47 U.S.C., Section 409(1) does confer the immunity under these circumstances; and we do have these two cases, Marcus and Brown, which discuss that subject at great length. We do not have any other cases, I take it, Mr. Polakof.

Mr. Polakof: Your Honor, as I said to you, I've not done thorough research. I believe this requires thorough research and I believe this is a very important question, and

that's why I stepped out of the case. I've done my duty this morning at Your Honor's request. From here on I believe Mr. Harris is entitled to counsel.

[fol. 17] Judge McLean: Well, I do want to know a little more about the record of the Marcus case. You don't actually have the record?

Mr. Maloney: No, I do not, Your Honor.

Judge McLean: I suppose we could get that.

Mr. Maloney: It's not in this Circuit, Your Honor. I presume it might be in the library. It might not be here, though.

Judge McLean: The question has been raised as to whether or not the Marcus case which is—after all, seems directly in point here—was involved in some investigation of the Telephone Company. Now, the way to find out is to look at the record.

Mr. Maloney: If Your Honor please, assuming *arguendo* it started that way, would this mean that all Grand Jury investigations would have to start similarly in order to grant immunity? I do not believe the position of counsel is at all sound here, even if we assume everything about the initiation of this thing.

Mr. Polakof: May I state, Your Honor, that if I was to continue on this case I would so advise Mr. Harris to tell his subsequent lawyer that I would require a hearing; I would require that this point be raised head on. Now, it's apparent to Your Honor as it must be to everyone in this room that a violation of the Telephone or the Communications Act is misapplied. Now, if they have that right, I think the Supreme Court would have to say something. I do not think they have that right, and my training as a lawyer in this court for forty-two years tells me it has not been given because I've been in cases where I know, where U. S. Attorneys have offered witnesses immunity and they couldn't give it, and the Court wouldn't direct it. They didn't have that power. What you're doing [fol. 18] here is substituting the power of this court or of the Grand Jury for the legislative power of Congress, and we know the Supreme Court has said many times that Congress makes the laws.

Judge McLean: Well, Congress made a law in the form of this Section that I just cited a minute ago. The ques-

tion is what does it mean in '34, and what was the purpose of the other immunity sections, and what was the purpose of the Attorney General and various Congressmen introducing bill after bill for immunity in certain crimes which were denied. Now, it's almost 1:30. I expect the Grand Jury would like to have a little lunch, and I would like to have some myself. I think the purpose to be served that I had in mind last week is that Mr. Polakof has obviously thought about it and I'm not going to act today without further thought on the matter. Now, I would direct that the witness come back here tomorrow in the morning and I'll ask Mr. Polakof to come back with him and stay in that long at my request.

Mr. Polakof: Oh, Your Honor.

Judge McLean: And I'll announce my decision then. We'll go on from there. Now, what time does the Grand Jury meet—11 o'clock?

Mr. Maloney: 10 o'clock, Your Honor.

Judge McLean: Well, we meet here at 10 o'clock. That will be time enough.

Mr. Polakof: Your Honor, may it be specifically understood—of course, if you want to decide in the witness' favor—but if you don't, and there's a contempt proceeding, I do not wish to remain in the case under the circumstances.

Judge McLean: Well, I won't cross that bridge yet. If there's a contempt proceeding it may not be a prolonged one.

[fol. 19] Mr. Polakof: Well, I mean it's a question of appeal and a question of bail. There's a lot of questions.

Judge McLean: I certainly am not asking you to stay in for any appeal.

Mr. Polakof: I got myself unnecessarily involved.

Judge McLean: 10 o'clock tomorrow morning at which time I'll let you know. Now, if you can get me that record, I'd like to have it. If you can't get it, you can't get it.

Mr. Maloney: All right, Your Honor.

[fol. 20]

TRANSCRIPT OF GRAND JURY EXHIBIT 2

August 7, 1963.

Re: AL HARRIS, et al.
MR. MALONEY.

Witness: AL HARRIS

AL HARRIS, having been duly sworn by the Foreman, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please? A. Al Harris (spells).

Q. Mr. Harris, before proceeding any further, may I see the subpoena by which you appeared here this morning?

Mr. Maloney: Would you mark this Grand Jury Exhibit #1, please? (So marked.) May the record reflect that Grand Jury Exhibit #1 is a subpoena which Mr. Harris gave to me, which sets forth that Mr. Harris will be here this morning to testify and give testimony in regard to alleged violations of Sections #501 and #203-C of Title #47, United States Code.

Q. Now, Mr. Harris, before proceeding any further, let me advise you that you have a constitutional right not to answer any of my questions if you feel the answer might incriminate you in any way; do you understand that, sir? A. I do.

[fol. 21] Q. Now, Mr. Harris, do you know of a phone call made by John Manarite, around January or early February of this year, from Miami, Florida to Flushing, New York, in connection with the leasing of a premises in Ojus, Florida, for the purposes of a dice game? A. I refuse to answer on the ground it would tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that last question?

Foreman: Would you please answer the question?

Witness: I refuse to answer on the grounds it would tend to incriminate me.

Q. Now, let me advise you, Mr. Harris, that this Grand Jury is inquiring into alleged violations of the Federal Communications Act, namely Sections #501 and #203-C, in that there are allegations that a phone call was made to lease a premises for gambling purposes, and as such, this phone call was therefore being used as an interstate wire facility, by which a gambling enterprise would be promoted or furthered. Do you understand that, sir? A. I do.

Q. Do you also understand that, in proceedings inquiring into federal communications violations, the Grand Jury, after you invoke your privilege against self-incrimination, may direct you to answer questions, and by so doing, grant you immunity under Title #47, United States Code, Section 409-L? In other words, on any answers to my questions that you're directed to answer, you're given immunity from prosecution. Do you understand that, sir?

Foreman: It cannot be used against you.

Q. Do you understand the question? A. I do.

[fol. 22] Q. Now, once again, Mr. Harris, let me ask you: do you know of a phone call made by one, John Manarite, in January or February of this year, from Florida to Flushing, New York, in connection with the leasing of a premises for the purpose of establishing a dice game in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct the witness again?

Foreman: I again put the question: do you understand this question cannot incriminate you? Do you still refuse to answer?

Witness: I refuse to answer.

Q. Now, Mr. Harris, do you know whether or not Mr. Manarite used a pay telephone? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that question?

Foreman: Again I direct you to answer the question, and do you still refuse to answer?

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman—

Foreman: I again direct you to answer.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's [fol. 23] premises was used by Mr. Manarite for that telephone call? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: I again direct the question to you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know whom Mr. Manarite was working for, or in partnership with, in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone, from Florida to Flushing, New York? A. I refuse to answer on the grounds it might tend to incriminate me.

Foreman: I again direct the question to you.

Witness: I refuse to answer on the grounds it will tend to incriminate me.

Q. Mr. Harris, do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman—

Foreman: It is again my duty to direct the question again to you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know whether or not, at the time of the making of this phone call, Mr. Manarite was in the employ, or in partnership with Mr. Thomas Lucchese? A. [fol. 24] I refuse to answer on the grounds it may tend to incriminate me.

Foreman: And again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, I ask you: do you know any of the person or persons who were the employers or partners of Mr. Manarite, at the time of the telephone call in question? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: Again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, in connection with this phone call, were you a partner in the operations of the dice game at the premises in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: And again I direct the question to you.
Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. Now, Mr. Harris, do you have an attorney here this morning? A. No, sir.
Q. Who is your attorney? A. I don't have any.
Q. Do you recall being here on August 7th? Excuse me—August 1st of last week? A. Yes.
Q. Were you here at that time with an attorney? A. Yes.
Q. What was his name? A. Moses Kove.
Q. And were you here the day before that, on July 31st? A. Yes.
[fol. 25] Q. And were you here a week before that, on July 24th? A. Yes.

Q. Now, on July 24th, did you appear here with an attorney? the first appearance you made? A. No.

Q. Do you know Mr. Henry Panzer? A. I know of him.

Q. Was he there that morning? On July 24th? A. Yes.

Q. Was he giving you advice that morning? A. No, sir.

Q. Did he direct you away from conversing with Agent Pat Collins of the FBI that morning, outside the Grand Jury room? A. I don't recall.

Q. You don't recall? A. No.

Q. Could it have happened, sir? A. I don't know, sir.

Q. Why isn't Mr. Polakoff here this morning? A. I refuse to answer on the grounds it may tend to incriminate me.

Foreman: Do you want me to direct that question?

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. It will incriminate you as to why Mr. Polakoff is not here this morning? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct this witness to wait outside the Grand Jury room until he's told to enter it once again?

Foreman: Yes; you'll go out for a few minutes?

(Witness leaves room and is recalled.)

Foreman: You have already been sworn.

Q. Mr. Harris, I remind you you're still under oath. A. Yes.

[fol. 26] Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida? A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, would you direct him to answer that last question?

Foreman: I so direct you.

Witness: I refuse to answer on the grounds it may tend to incriminate me.

Q. You may step outside, sir.

Mr. Maloney: Mr. Foreman, would you direct this witness to appear in Room #1505, immediately, upstairs?

Foreman: I so direct you; #1505, upstairs, right away.

(Witness leaves room.)

[fol. 27] August 8, 1963

Re: Al Harris

Mr. Maloney,
Assistant U. S. Attorney

Grand Jury in Court Session before
Judge McLean, U.S.D.J.

APPEARANCES:

ANDREW J. MALONEY,
Assistant United States Attorney

MOSES POLAKOF,
Attorney for Mr. Al Harris

AL HARRIS,
Witness

G. J. Steno: M. T. Connolly
Date: August 8, 1963

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Polakof: Your Honor, I was distressed to learn after we concluded our session yesterday that the Court reporter had not been present. I assumed that the lady who's sitting where she is now in the reporter's seat was a court reporter. After the session I asked her for a copy of the minutes. She told me she's a Grand Jury Stenographer and couldn't help me out.

I believe any proceedings before Your Honor requires a record for yourself and for me. Now, I do not know whether

the Grand Jury Stenographer reported everything that took place yesterday. If she did, I would like Your Honor to direct her to furnish me with a copy of the minutes. I'll be glad to pay for same.

[fol. 28] Judge McLean: Yesterday and still this morning we were in a Grand Jury proceeding; hence, the reporter was a Grand Jury reporter and we still have a Grand Jury reporter here today, and I certainly assume that she took down everything that was said. Did you, Miss Reporter?

Reporter: Yes, Your Honor.

Judge McLean: Now, I will not direct at this point that the minutes of the Grand Jury proceeding be made available to you. We haven't reached that point yet, and I hope that we won't. But if there should come a time when some contempt proceedings are instituted here and there could come a time when the witness wishes to take an appeal from any direction that may be entered into, at that point I think counsel is entitled to the minutes.

Mr. Polakof: May I call Your Honor's attention to the fact that last week when we had a hearing, also with the Grand Jury present, and with the public excluded, the Court Reporter was present and I did obtain a copy of the minutes.

Judge McLean: We didn't have any Grand Jury present last week. I did exclude people from the court room because there was going to be some discussion of what had occurred before the Grand Jury. I am sure that your clients are protected.

Mr. Maloney: If Your Honor, please, unless Your Honor wishes to hear further argument from the government, the Grand Jury would again seek your aid and assistance in directing the witness to answer the questions as put to him in the Grand Jury room.

Judge McLean: I was advised that the actual complete record in the Marcus case which we mentioned yesterday could not be supplied to me before today because it's in Philadelphia and would take a week or more to get it up [fol. 29] here, and I do not think it's necessary to delay these proceedings to await the arrival of that record. I have again since yesterday carefully reviewed the cases

which seem to be in point and also the Levine case which was mentioned by Mr. Maloney yesterday—United States against Levine, 267 F. (2d) 335, a decision of the Court of Appeals of this Circuit in 1959—and the situation seems to me to be this Grand Jury has represented to the Court that it is investigating possible violations of Title 47, Communications Act.

I must assume and I do assume that representation is made in good faith. The subpoena to this witness directs him to appear and testify with respect to possible violations of the Communications Act. The Court of Appeals in the Levine case has held that it is not the province of the witness to question whether or not the Grand Jury is actually investigating the matter that it says it is investigating. It is perfectly clear to me under title 47, Section 409(f) that in an investigation of possible violations of the Communications Act, the witness has no constitutional privilege to refuse to testify because he gets complete immunity against prosecution for anything that he may say in answer to questions which he is directed to answer in such a proceeding.

I therefore direct the witness to answer the questions.

Now, Mr. Polakof and I will retire from the Grand Jury room and you can proceed to ask the witness the questions.

Mr. Maloney: Your Honor, I believe you inadvertently referred to 409(f). I think it is 409(l)—just for the record's sake.

Judge McLean: It looks to my old eyes like an "f". It follows after "k", so it must be "l".

Mr. Maloney: Thank you, Your Honor.

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[fol. 30]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Transcript of Testimony

Before: Hon. Edward C. McLean, District Judge.

New York, August 8, 1963;
10 o'clock a.m.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the government; By Andrew J. Maloney, Esq., Assistant United States Attorney.

Moses Polakoff, Esq., Appearing for Al Harris.

Mr. Maloney: If your Honor please—

Mr. Polakoff: May it please your Honor, just so the record may be straight, my silence to your rulings did not indicate, your Honor, that I was acquiescing in them. I was just respectfully remaining silent.

Mr. Maloney: If your Honor please, the grand jury is back here once again to seek your aid and assistance in connection with an investigation before it involving the [fol. 31] Federal Communications Act and the witness, Mr. Harris.

I have the stenographer who took the minutes after your Honor had directed his answers, and with your Honor's permission I will swear in the stenographer and read that record.

The Court: Very well.

MARGARET T. CONNOLLY, called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maloney:

Q. Miss Connolly, by whom are you employed?
A. United States Department of Justice.
Q. In what capacity?
A. Grand jury reporter, Southern District of New York.
Q. And were you so employed this morning when Mr. Al Harris testified before the grand jury?
A. Yes, sir.

Mr. Maloney: Will you mark this as Government's Exhibit Number 1 for identification.

(Marked Government's Exhibit 1 for identification.)

Q. Miss Connolly, I show you what has been marked Government's Exhibit 1 for identification. I ask you, can you identify it?
A. Yes, sir.
Q. What is it?
A. These are grand jury notes which I took of the grand jury hearing of Al Harris this morning.

[fol. 32] Mr. Maloney: Now, with your Honor's permission, may the witness read those minutes?
The Court: Yes.
The Witness: (Reading):

"Mr. Harris was resworn by the Foreman of the grand jury.
"Mr. Maloney: (Q.) Mr. Harris, do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida, to Flushing, New York, in connection with the leasing of the premises in Ojus, Florida, for the purposes of a dice game?
A. I respectfully refuse to answer on the ground that it may tend to incriminate me.

"Mr. Maloney: Mr. Foreman, will you direct him to answer that last question?
"The Foreman: I so direct you.

"The Witness: I respectfully refuse to answer on the ground that it may tend to incriminate me."

Q. Do you know whether or not Mr. Manarite used a pay telephone?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: I direct you to answer.

"The Witness: I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"Q. Do you know whether or not he used a private premises to make that telephone call?

A. I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"The Foreman: Again I direct you to answer.

[fol. 33] "The Witness: I respectfully refuse to answer on the grounds it may tend to incriminate me.

"Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

A. I respectfully refuse to answer on the grounds that it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the grounds it may tend to incriminate me.

"Q. Do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises—

"Q. Excuse me—that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

A. I—"

The Court: That last was part of a question?

The Witness: He interrupted in the middle of a question. Would you like me to read it without interruption, to be clear?

The Court: Yes, read it again.

The Witness: (Reading):

"Q. Mr. Harris, do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: Again I direct you to answer.

[fol. 34] "The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one, Carmine Tramunti?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. Mr. Harris, I ask you do you know any of the person or persons or were the employers or partners of Mr. Manarite at the time of the telephone call in question?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Q. In connection with this phone call were you partner in the operation of the dice game at the premises in Ojus, Florida?

A. I respectfully refuse to answer on the ground it may tend to incriminate me.

[fol. 35] "Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

A. I respectfully refuse to answer on the ground that it may tend to incriminate me.

"The Foreman: And again I direct you to answer.

"The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

"Mr. Maloney: Now, Mr. Foreman, would you direct this witness to wait outside.

"The Foreman: Will you please wait outside.

"(Witness leaves room.)"

Mr. Maloney: If your Honor please, that concludes the testimony of this witness this morning.

As your Honor has noted from previous argument at some length yesterday before your Honor at which Mr. Polakoff, the attorney for Mr. Harris, argued at length about why immunity would not attach, let me just state very briefly for the record that this grand jury has served a subpoena on Mr. Harris in connection with an investigation involving Title 47 of the United States Code, Section 501, which says in part that any person who wilfully and knowingly causes or suffers to be done any act, matter or thing prohibited or declared to be unlawful in the Communications Act, commits an offense punishable by fine and punishment.

In turn, in Section 203(c) of Title 47, it says no carrier shall provide communication service except as specified in its tariff.

[fol. 36] It is the government's position that this phone call in question was an unlawful phone call, in that it was attempting by the use of a wire facility in interstate commerce to promote and carry on a gambling operation which was to be conducted in Ojus, Florida, and, therefore, under the "causes and suffers" clause of Section 501 of Title 47, the use of that wire facility as well as any of his aiders or

abettors could be guilty of a violation of the Communications Act; and in connection with this investigation this grand jury, as your Honor has heard at length, is prepared to offer the witness immunity from prosecution for any testimony elicited from him in response to its questions, under Section 409-L of Title 47.

I therefore ask your Honor to direct this witness once again to answer the questions that were put to him.

Mr. Polakoff: Your Honor, I am not going to repeat the argument of yesterday, with one exception.

The grand jury has no authority to offer anyone immunity. That is solely by statute.

The Court: I will again direct the same questions to the witness:

Mr. Harris,—

Mr. Maloney: Excuse me, your Honor. I believe, perhaps, just for the record he should take the witness stand and be resworn in case he might answer any of your Honor's questions.

The Court: Very well.

[fol. 37] Al Harris, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. Do you know of a phone call made by John Manarite around January or early February of this year from Miami Florida to Flushing, New York in connection with the leasing of a premises in Ojus, Florida for the purpose of a dice game?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not Mr. Manarite used a pay telephone?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call?

The Court: I direct you to answer that question.
The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?

The Court: I direct you to answer that question.
[fol. 38] The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whom Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the ground it may tend to incriminate me.

Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?

The Court: I direct you to answer that question.
The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

Q. Mr. Harris, I ask you, do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?

The Court: I direct you to answer that.
The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

[fol. 39] Q. In connection with this phone call, were you a partner in the operation of the dice game at the premises in Ojus, Florida?

The Court: I direct you to answer that.

The Witness: I respectfully refuse to answer on the grounds that it would tend to incriminate me.

Q. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

The Court: I direct you to answer that question.

The Witness: I respectfully refuse to answer on the ground it would tend to incriminate me.

The Court: Does anybody want to say anything further?

Mr. Maloney: Your Honor, I think just for the record if your Honor would remind the witness that his responses to those questions—in response to these questions he is being granted immunity under 409-L.

The Court: I have already made my position perfectly clear, but I will say it again:

I have directed you to answer these questions before the grand jury, and I have directed you to answer them here. It is my ruling that you cannot be prosecuted for any answer that you give under the circumstances of this case.

Do you still refuse, Mr. Harris?

The Witness: I respectfully refuse to answer on the grounds it would tend to incriminate me.

[fol. 40]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Anything further?

Mr. Maloney: No, your Honor.

I think the record speaks for itself, and I would ask your Honor to find this witness in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure.

Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.

I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.

I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

[fol. 41] Mr. Polakoff: Or a hearing on contempt open to the public?

The Court: This is open to the public.

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

He is remanded to the custody of the marshal.

Mr. Polakoff: Will your Honor fix bail pending appeal?

The Court: Now I will entertain an application for bail. Do you intend to serve a notice of appeal?

Mr. Polakoff: Yes, your Honor. I told him I would, but I don't know whether I will personally continue with the appeal—

The Court: I am sorry to inconvenience you, Mr. Polakoff,—

Mr. Polakoff: (Continuing)—not until he pays me.

The Court: (Continuing)—but you have got to stay in here to protect this defendant until we get this part of it over with even though it does mean some personal inconvenience to you, and I appreciate your willingness to do it, [fol. 42] and I have to insist that you do, as I am sure you intend to anyway.

Now, I suppose that some formal order of commitment has to be signed, and then a notice of appeal has to be filed before an application for bail can be made; isn't that so?

Mr. Maloney: No, your Honor; an application for bail can be entertained by your Honor at this point.

Mr. Polakoff: At this point.

The Court: Does everybody agree on that?

Mr. Polakoff: I have ten days, haven't I, to file an appeal? Maybe some other lawyer will do it, but I am protecting him now.

The Court: You now apply for bail pending appeal?

Mr. Polakoff: Yes.

The Court: And you assure me you are going to take an appeal?

Mr. Polakoff: Yes, your Honor, I can assure you that an appeal will be taken, either by me or someone else.

The Court: And promptly.

Mr. Polakoff: Well, I must file—

The Court: You will take care of it and the notice of appeal filed?

Mr. Polakoff: It must be filed promptly, otherwise he waives it. It must be filed within ten days.

The Court: I don't want Mr. Harris to look around for a lawyer to file a notice of appeal for him.

Mr. Polakoff: I will file it for him.

The Court: You will file it for him if he is going to take it; is that understood?

[fol. 43] Mr. Polakoff: Yes, your Honor.

The Court: Now what do you say about bail?

Mr. Maloney: On the question of bail, your Honor, we are faced with a defendant who is facing one year incarceration. That alone should be a good reason for setting a substantial amount of bail.

And, in addition, Mr. Harris, who was living in the Concord Hotel at that time when interviewed by federal agents refused to divulge his permanent residence, which is an indication, I believe, your Honor that he certainly would be a bad risk for bail. His legal residence that he has claimed in the past is Miami, and he is presently residing at the Park Sheraton in New York City.

He is fifty-two years of age, and he has no known—to the government—no known legal occupation. He has two prior gambling misdemeanor convictions in Miami. These were disposed of by fines. It is the government's information that he is currently trying to get into the Grand Bahamas to work as a gambler, which is, of course, outside the jurisdiction of the United States. He is registered in Las Vegas as a gambler. He is divorced. He has two adult sons who are both gainfully employed and therefore not dependent upon this defendant for support.

In the light of all this, your Honor, and, of course, bearing in mind that he is facing or has been sentenced to one year imprisonment, and bearing in mind that in my view, the government's view, I see no real issues for appeal, the government asks that bond be fixed in the amount of $25,000.

Mr. Polakoff: Your Honor, that is—

[fol. 44] The Court: Just a minute. In my opinion the issues raised here are not frivolous, and I certainly will admit him to bail, and the only question is as to amount.

What do you suggest?

Mr. Polakoff: Oh, your Honor, this man won't run away. It is a gambling charge. If we are wrong in our opinion perhaps he will change his views and answer the questions. He is available to subpoena. When your Honor asked me would I accept the subpoena in court for him, we did? He could have walked out of the courtroom. The proceedings would have been over. The government would have had to look for him.

We have been here every time we have been directed to be here. There is no sense making bondsmen rich. I am on a committee of the Bar Association and we are trying to do away with bond; we are trying to do away with bondsmen. If he ran away he is guilty of an offense which carries five years. Is he going to add this to this?

I suggest a nominal bail of $1,000 would keep him here, your Honor.

Mr. Maloney: Your Honor, I will remind the Court under the Federal Rules of Criminal Procedure, all of a witness' or a defendant's roots in the community are one of the primary concerns, as noted in Stack v. Boyle. This particular defendant, to the government's information, and as far as this record is concerned, by his own counsel has not shown that he has any substantial roots in the community to keep him here.

[fol. 45] Mr. Polakoff: Well, your Honor, where are they going to run? Who is going to give up his American citizenship for a gambling charge or a charge for a violation of the Communications Act?

The Court: It is a question of judgment. I think you are both extreme. I will fix bail in the amount of $10,000. He will have to remain in custody until he posts it.

Now, if Mr. Harris should decide that he will answer the questions and testify, if he makes a motion within sixty days, I believe it is—

Mr. Polakoff: That is right, your Honor.

The Court: (Continuing) —for a reduction of sentence after having testified, I will be glad to consider a reduction of sentence.

I think this disposes of all the issues here?

Mr. Maloney: Thank you, your Honor.

Mr. Polakoff: Well, your Honor, may I have a copy now of these minutes and the minutes of yesterday?

The Court: Yes.

Now, as far as the grand jury minutes are concerned, those are, of course, solely for the use of yourself and your client or your successor attorney, if there is one.

Mr. Polakoff: Of course, your Honor, I do not want to be facetious, but my presence in the grand jury room vitiates

the secrecy. I am going to keep it only at your Honor's direction, because your Honor has suggested it. But the mere fact that I was present—I am an unauthorized person, and any act that the grand jury took in my presence could be nullified.

[fol. 46] But for the appeal it is important to have the minutes of yesterday and the minutes of today.

The Court: I directed that you be present because I thought it would be fair to you and fair to Mr. Harris to have you there.

Mr. Polakoff: That is right. That is why I am going to observe the secrecy, your Honor. And I will get the minutes?

The Court: Yes.

[fol. 47]

In United States District Court

Southern District of New York

Present: The Honorable Edward C. McLean, United States District Judge.

Criminal No. 63 CR 664

Criminal Contempt of Court by Refusing to Answer Questions Before Grand Jury

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The United States,

—vs.—

Al Harris.

Remand—August 8, 1963

8-8-63 The Court adjudges that the defendant is in Contempt of Court and Sentences him to One (1) Year at a place of confinement to be designated by the Attorney General of the U. S.

On the motion of the United States Attorney, Bail pending appeal fixed in the sum of $10,000.

[fol. 48] Ordered that the prisoner be remanded to the custody of the United States Marshal in lieu of Bail.

An extract of the Minutes.

James E. Valeche, Clerk, By Bernard Toomin, Deputy Clerk.

Endorsement On Remand

Released on bail this 8th day of August 1963.

David Sweeney, Deputy Clerk.

[fol. 49]

In United States District Court

Southern District of New York

Contempt Order—August 9, 1963

Al Harris, having committed, in the presence and the hearing of this Court, certain acts which are set forth in detail in the Certificate attached to this order, it is

Ordered, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant Al Harris hereby is found to be in contempt of this Court, and is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of one year. Bail in the amount of $10,000.00 was fixed on August 8, 1963, pending appeal.

Dated: New York, New York, August 9, 1963.

Edward C. McLean, U. S. D. J.

[fol. 50]

ATTACHMENT TO CONTEMPT ORDER—CERTIFICATE OF EDWARD C. MCLEAN, *U.S.D.J.*

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the defendant Al Harris, in the presence and the hearing of the Court, on August 8, 1963, committed the acts set forth in Exhibit No. 1 attached to this certificate, and that these acts constitute a contempt of the Court.

I further certify that on August 7, 1963, the defendant Al Harris was brought before me and in the presence of the United States Grand Jury for the Southern District of New York and the attorney for the defendant Moses Polakoff, Esq., the questions set forth in Exhibit No. 1 were read and counsel for the defendant was heard on the question of why the defendant should not be directed by the Court to answer the questions as put to him.

On August 8, 1963, in the presence of the defendant Al Harris and his attorney and in the presence of the United States Grand Jury for the Southern District of New York, I found that immunity as provided by Section 409(l) of Title 47, United States Code, was applicable and that the defendant no longer had a right to invoke his privilege against self-incrimination, and I directed the defendant to answer the same questions as set forth in Exhibit No. 1. Thereafter, the Grand Jury returned and in open court, in the presence of the defendant and his attorney, I was once again informed of the defendant's refusal to answer the [fol. 51] questions as set forth in Exhibit No. 1. I again directed him to answer the same questions which he had refused to answer the same questions which he had refused to answer in the Grand Jury proceedings, and once again in my presence he refused to answer the same questions. Defendant failed to state any valid reason why he should not be held in contempt of this Court.

Accordingly, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Al Harris in contempt of this Court and committed him to the custody

of the Attorney General, or his authorized representative, for imprisonment for a period of one year.

Dated: New York, New York, Aug. 9, 1963.

EDWARD C. MCLEAN, *U. S. D. J.*

[fol. 52]

EXHIBIT 1 ANNEXED TO CERTIFICATE OF EDWARD C. MCLEAN, U.S.D.J.

AL HARRIS, recalled before the Grand Jury, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

Mr. Maloney: Mr. Foreman, will you reswear the witness.

Foreman: Would you stand, please, and raise your right hand. Do you solemnly swear in the proceedings now pending before this Grand Jury that you will tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

By Mr. Maloney:

Q. Mr. Harris, do you know of a phone call made by John Manarite around January or early February of this year from Miami, Florida, to Flushing, New York, in connection with the leasing of a premises in Ojus, Florida, for the purposes of a dice game? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Mr. Foreman, will you direct him to answer that last question.

Foreman: I so direct you.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not Mr. Manarite used a pay telephone? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

[fol. 53] Foreman: I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not he used a private premises to make that telephone call? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises— A. I respectfully—

Q. Excuse me—that he talked about in his telephone conversation with a person or persons he talked to on the telephone from Florida to Flushing, New York? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

[fol. 54] Do you know whether or not Mr. Manarite was at the time of the making of this phone call in the employ or in partnership with one Carmine Trumanti? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ or in

partners with Mr. Thomas Luchese? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, I ask you do you know any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. In connection with this phone call were you a partner in the operation of a dice game at the premises in Ojus, Florida? A. I respectfully refuse to answer on the grounds it may tend to incriminate me.

[fol. 55] Foreman: Again I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Q. Mr. Harris, did you at any time in January or February of this year make an interstate telephone call in connection with a dice game that occurred in Ojus, Florida? A. I respectfully refuse to answer on grounds it may tend to incriminate me.

Foreman: And, again, I direct you to answer.

The Witness: I respectfully refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Now, Mr. Foreman, would you direct this witness to wait outside.

Foreman: Would you please wait outside.

Witness leaves room.

[fol. 56]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Cr 664

[Title omitted]

NOTICE OF APPEAL

Name and address of appellant Al Harris, Concord Hotel, Kiamesha, N. Y.

Name and address of appellant's attorney Moses Polakoff, 475 Fifth Ave., N. Y. City

Offense Contempt of Court

Judgment August 8, 1963 Sentenced to one year

Name of institution where now confined Custody of U. S. Marshal.

The above appellant hereby appeals to the Court of Appeals Second Circuit, from the above stated Judgment.

Moses Polakoff, 475 5th Ave., New York 17, N. Y., LE 2-6600.

[fol. 57]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Transcript of Hearing of August 1, 1963

Before: Hon. Edward C. McLean, District Judge.

New York, August 1, 1963
12:15 o'clock p.m.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney for the Government, By Andrew Maloney, Esq., Assistant United States Attorney.

Moses Polakoff, Esq., Attorney for Mr. Harris.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Maloney: If your Honor pleases, I think for the record it perhaps best that Mr. Polakoff stipulate that we have no objection to the proceeding being followed here as far as the grand jury not being present and the fact that his client is not in the room.

Mr. Polakoff: He will be in in a second. He just—

[fol. 58] Mr. Maloney: And the fact that we are going to concern ourselves with certain testimony concerning his client before secret proceedings of the grand jury, discussions which follow will necessarily cover some of those areas.

Mr. Polakoff: If your Honor please, Mr. Harris, who is now present, consulted me about 4:30 yesterday afternoon. At about ten minutes to five I spoke to Mr. Maloney.

I have not been able to acquaint myself with the facts in the case and what the proceedings are about, and under the circumstances I think I should be informed what they are about and be granted an adjournment because if we are going to have a formal hearing, which I believe these proceedings are, I want the right to call witnesses, if necessary, to present proof, if necessary, to protect the defendant's interest.

Mr. Maloney: Your Honor, may I be heard just briefly?

The Court: Yes.

Mr. Maloney: I am prepared to inform Mr. Polakoff what the proceedings are about. Right now I want to assure him that because of my revealing what it is about we are not revealing certain matters concerning his client before the grand jury and, secondly, let me say that it is my understanding that this is not really a hearing in that sense, that your Honor has saw fit to hear counsel on the issue of immunity in this case, upon your Honor's own discretion; that actually this matter is still before the grand jury and that I in no event see any reason for the calling of other witnesses, et cetera, as counsel has asked.

The Court: Well, Mr. Polakoff's mystification is understandable. He just heard about this just recently.

Mr. Maloney: Sure.

[fol. 59] The Court: But this is not a hearing in the sense of calling a witness, Mr. Polakoff. I was advised yesterday by the Assistant United States Attorney that your client, Mr. Harris, had declined to answer certain questions propounded to him before the grand jury, and I went up to the grand room and these questions were read to me. It was perfectly apparent from the transcript of the proceedings that Mr. Harris said several times that he wished to consult an attorney about this matter. I said that I thought he was entitled to consult with an attorney and that I would be glad to hear what he and his attorney had to say about it today, so we are here today to discuss the legal questions involved in this matter and I think the nature of those questions will become quite clear to you if we give the Assistant United States Attorney a chance to explain.

Mr. Polakoff: Glad to.

The Court: We won't have any witnesses today. This is not a contempt hearing at this point.

Mr. Polakoff: That is what I—I assumed it was a contempt hearing, your Honor.

The Court: It is not a contempt hearing. The question before us today is whether or not Mr. Harris can be given immunity under the particular statute which is involved in the grand jury's investigation, and immunity sufficiently

broad so as to protect him against any possible prosecution for any testimony that he may give.

Now, I am just as concerned as you are to be sure that he has such immunity before I direct him to answer the questions because a man has the right to claim his constitutional privilege and I will not direct him to answer the questions and forego that privilege unless I am satisfied [fol. 60] that he gets complete immunity under the statute for anything that he may say.

Now, to the extent that it is necessary for the Assistant United States Attorney to tell us this morning what happened before the grand jury in order to make this question clear, I will direct that nobody here reveal any of that material, but I don't think that you have to go into it in any such detail as to raise any real danger of violation of secrecy.

Mr. Maloney: No, I was only concerned with counsel having no objection to my going into his own client's testimony.

Mr. Polakoff: No, go right ahead.

The Court: I will direct him not to reveal what happens here. What I am interested in here—is it Mr. Maloney?

Mr. Maloney: That's correct, sir.

The Court: I think you ought to tell us, Mr. Maloney, more than you told me yesterday as to what this grand jury investigation is so that I can decide whether or not there is any—

Mr. Maloney: If your Honor please, will you mark this Grand Jury Exhibit No. 2?

(Marked Grand Jury's Exhibit 2.)

Mr. Maloney: If your Honor please, subject to no objection from defense counsel, may we have the courtroom cleared of uninterested persons?

The Court: I think we would have to under the circumstances.

Mr. Maloney: Have you any objection?

Mr. Polakoff: No.

(Courtroom cleared.)

[fol. 61] The Court: May I see that subpoena?

Mr. Maloney: If your Honor please, your Honor will note that Grand Jury Exhibit No. 2, as has been stated, is a copy of a subpoena which was served, duly served upon Mr. Harris for his appearance before the grand jury on Wednesday, I believe, of last week.

Upon his appearance, Mr. Harris was asked certain questions and he invoked his privilege under the Fifth Amendment.

He was thereupon directed by the foreman of the grand jury to reappear before the grand jury at ten o'clock yesterday morning.

Now, upon his appearance before the grand jury yesterday morning, he was informed by me—excuse me, does your Honor have a problem with the section involved?

The Court: Yes.

Mr. Maloney: That is the general conspiracy section, your Honor, of Title 18, which covers a conspiracy to defraud the United States, or any of its agencies, by any Federal crime of any nature. It is a general conspiracy section, your Honor, which would cover any and all Government—Federal Government violations; crimes, that is.

Upon his appearance before the grand jury yesterday morning, your Honor, he was informed by me that he certainly had a constitutional right not to answer my questions, but that the grand jury was inquiring into, namely, violations of the Federal Communications Act, Sections 501 and 203(c) of Title 47, and also into alleged violations of Title 18, Section 1952, which is the general racketeering and gambling section.

The Court: Yes. Will you just go a little slower? What are those sections again?

Mr. Maloney: Title 47, U.S.C. Section 501 and 203(c). Those are the Federal Communication violations.

[fol. 62] The Court: And the other one?

Mr. Maloney: The other one is the alleged violation of Title 18, United States Code, Section 1952, which is the general racketeering section covering interstate gambling.

Mr. Harris was asked whether or not he had attended a particular dice game in Florida on February of this year, at which time he invoked his privilege.

The Government, of course, has no argument against Mr. Harris invoking his privilege. However, he was subsequently asked other questions concerning another individual who made a phone call from Florida to New York City in order to lease the premises at which the dice game was held, and it is the Government's contention that from the FCC regulations that where an interstate wire communication is made—is used to promote or carry on an unlawful activity such as gambling, this is a violation of those regulations.

Now, it is to get at all the details concerning that particular communication or communications that the grand jury had saw fit to grant this particular witness immunity under Section 409 (1) of Title 47, which is a general immunity section concerned with witnesses involving violations of the FCC laws.

He thereupon still refused, at the direction of the foreman, to answer questions put to him concerning his knowledge of the leasing of these premises by phone and of knowing a certain party or parties who were the employers or partners of the man making the phone call.

It is the Government's position—I might say this has just a focal point, your Honor—every witness, the authorities teach us, *U. S.* v. *Rogers,* and on down, Supreme Court decisions—that every witness has a duty to testify before the grand jury.

[fol. 63] Balanced against this, the courts tell us we must balance his right against self-incrimination. I would be less than candid with the Court if I said that this individual would not be in jeopardy if he answered fully all the questions voluntarily.

Nevertheless, the grand jury has taken the extraordinary step of granting this individual, Mr. Harris, immunity from prosecution under the FCC Act and, therefore, I cannot see at all what prejudice will fall upon Mr. Harris should he now testify fully and honestly and truthfully before the grand jury, because I must remind Mr. Harris, who is sitting here, that any perjury he commits, of course, is a separate crime and is not covered by the general immunity clause.

Now, moving on one step further, your Honor, in order to find out all the details of this alleged violation of the FCC laws, that is, that this was an unlawful call to lease the premises for gambling, the grand jury naturally will have to go into a myriad of questions concerning the partners or partner, or employer or employers, behind the man who made this illegal call and, therefore, cannot be limited on those questions, and, therefore, can ask that under the authorities in *U. S.* v. *Marcus*, the citation, I believe, which is 310 F. (2d) 143, *Brown* v. *United States*, which is 359 U.S. 41, that the witness Harris be directed forthwith to answer the particular questions put to him and any others which are relevant to that particular FCC violation, your Honor.

The Court: Is there any evidence in addition to what you have stated as to what this grand jury is investigating? Is there any submission of an Assistant United States Attorney, or anything of that sort, which shows what is alleged? [fol. 64] Mr. Maloney: Well, obviously the testimony of other witnesses, which I am not at all prepared to reveal to Mr. Harris or his attorney, would show what we are investigating, but I believe it will suffice to tell the Court that we are investigating two things here: The violation of the FCC laws by the unlawful phone call, and also the nature and circumstances surrounding a dice game which occurred in Florida in February of this year, which we feel was a violation of Section 1952 in that certain person or persons who ran this game went across interstate lines to promote and carry on this particular dice game in Florida, and it would be the Government's contention also that this dice game was of a substantial nature involving numerous elements, important figures in organized crime, and in order to plan and promote this game there had to be numerous phone calls in order to set up the premises, in order to lease the premises, and so forth, so obviously this is a joint investigation. I would be less than—

The Court: You are telling me that the grand jury is investigating the allegedly illegal use of the telephone—

Mr. Maloney: That is correct, sir.

The Court: —with respect to leasing premises in which a dice game is supposed to have taken place, is that right?

Mr. Maloney: That is correct, sir.

The Court: And the crimes that they are investigating are the use of the telephone communications under the Communications Act?

Mr. Maloney: That is correct.

The Court: And also the substantive offense under 18 U.S.C. Section 1952, which seems to say that whoever travels in interstate or foreign commerce and uses communication facilities in interstate or foreign commerce with intent to distribute the proceeds of any unlawful activity, and so forth?

[fol. 65] Mr. Maloney: Right.

The Court: And the facility of interstate commerce they are talking about is the telephone?

Mr. Maloney: It could be, your Honor, or it also could be the other part of Section 1952 concerning his travel.

The Court: Oh, it could be just travel?

Mr. Maloney: It could be just travel.

The Court: The reason I asked you the question that I did is because in the Marcus case—

Mr. Polakoff: That's the one.

The Court: —nothing was said, but, you remember, reference was made to the authorization of the special attorney to take part in the grand jury proceeding. It was then decided that that authorization related to authorization under the Federal Communications Act, and so forth.

Is there anything like that here?

Mr. Maloney: No, no, there is no particular such authority right now, your Honor.

The Court: And your subpoena, which told Mr. Harris that he was to come down here and testify in connection with violation of Section 18 U.S. 371, which is the conspiracy section, that hasn't anything to do with the telephone?

Mr. Maloney: No, it did not.

The Court: There again that is different from the Marcus case, or one of these cases where the subpoena specifically referred to the Communications Act, right?

Mr. Maloney: That is correct, your Honor.

The Court: Now, I may have the advantage of Mr. Polakoff—I hesitate to think that I do—but I did spend the evening reading these cases last night.

Did you do that, too?

[fol. 66] Mr. Polakoff: No, your Honor. I—

The Court: Do you know the cases that we are talking about?

Mr. Polakoff: I know the Marcus case. I do not know the other cases, sir.

The Court: Do you know the Brown case?

Mr. Polakoff: I don't recall it offhand, your Honor.

The Court: Have you read the section of the statute?

Mr. Polakoff: Yes, sir, I did that this morning, very briefly.

The Court: Yes. Are you able to tell me what your views are on this now?

Mr. Polakoff: I will do the best I can, your Honor, extemporaneously. You can see what a disadvantage I am at, but I think I can improvise as I go along.

In the first place, your Honor, this is an investigation of a dice game. If I recall when Section 1952 and '53 were passed, which were racketeering statutes—I am not sure of this, your Honor, but I have been on committees passing on Federal legislation and I am just relying on my recollection—the original Act provided for immunity under 1952, as it does under 1953.

Congress did not see fit to give the U. S. Attorney the authority to grant immunity under '53, but did give him authority to grant immunity under 1953, which is the racketeering statute.

It is quite apparent that this is an investigation of gambling and it is solely governed by 1952.

I did not glance or did not even know the two sections of the Communications Act that were stated by Mr. Maloney because that would require going through almost the entire volume, but I did look at that section—I don't recall the number—that deals with immunity, and I think that [fol. 67] immunity goes solely to the Commission, the Communications Commission, because, if you will notice, that statute gives the Commissioners or Commissioner the right to issue a subpoena and compel testimony before the body, the Commission, and they, like the Security and Exchange Commission, may decide whether they want to give the witness immunity or not.

It is my opinion that the Communications Act does not deal with this kind of a crime; it deals with television, telegraph, radio and other means of permit for communications.

This is an attempt, in my opinion—and I say this advisedly—to circumvent the power to give immunity.

This, I believe, your Honor, is the first attempt that has been made to invoke this procedure. I know of my own knowledge that there have been dozens, perhaps hundreds of witnesses, who have claimed their privilege before the grand jury which was investigating gambling and at no other time prior to this, to my recollection—if I am wrong, I would ask Mr. Maloney to correct me—has the Communications Act ever been invoked.

Now, it is quite apparent that your Honor has done considerable research and I wish to say that your Honor has fairly and accurately stated the problem for both sides.

I don't think I am prepared to argue fully. I believe I am correct, and I would like to have an opportunity to make some research and be of some help to the Court in arriving at a conclusion.

The Court: Yes.

Mr. Polakoff: Now, I understand the point. I don't want to know the questions that were put to this witness at this particular time because we are really involved in a question of law. Mr. Maloney has stated that it is an investigation of two crimes.

[fol. 68] If he said—and I am not sure that he is correct—that a telephone call to lease a premises for gambling purposes comes under the Communications Act, would he limit it to the telephone call, because here we have a specific act, and I believe if your Honor will read one sentence a paragraph further on, they define facilities—the Act defines facilities and I think it also uses the word "telephone."

I am not sure of that, your Honor, but interstate travel, communication—and communication, I assume, means telephone.

Now, whether they use the word "telephone," or not, I am not at this moment sure but, in any event, it is quite apparent that this is an attempt to twist the lion's tail, or to corrupt the intent of Congress, and I would like to get

the reports and the debate in Congress on 1952 and to ascertain whether or not Congress deliberately eliminated 1952 from the immunity power.

Mr. Maloney: May I be heard just briefly your Honor?

The Court: Just a minute, Mr. Maloney. Then I will hear you.

But thanks to my nocturnal research last night, I am satisfied that the few cases which Mr. Maloney cites—the Brown case and the Marcus case—both hold that where the grand jury is investigating alleged violations of the Communications Act, putting it broadly, Section 409(1) of Title 47 does give the witness complete immunity against prosecution for any questions on any subject matters that he may testify to when he is compelled by an order from the court to testify, and if all that we have here is a grand jury investigating violations of the Communications Act and a witness subpoenaed testified and the subpoena said that the subject of inquiry was the violation of the Communications [fol. 69] Act, we would have a situation on all fours with those two cases, and I don't think I agree with you—in fact, I am sure, Mr. Polakoff—I don't agree with you that Section 409(1) referred only to proceedings before the Commission.

I think it is perfectly clear from the two cases—Brown and Marcus—that it refers to the grand jury investigations also, so I am sure you are wrong on that.

Now, the thing that troubles me, and the thing that was not made clear to me yesterday, was that apparently the grand jury is investigating something else, as well, namely, 18 United States Code, Section 1952 and '53.

Mr. Maloney: Just '52, your Honor.

The Court: What is the basis of immunity on that?

Mr. Polakoff: Just '52, your Honor.

The Court: '52?

Mr. Maloney: If your Honor please, I must direct your Honor's attention, first, in reply to your question, that in the Marcus case, that also was a joint investigation. As was stated in the case, he was also investigating gambling violations under 1084, which is the interstate transporta-

tion of wagering paraphernalia. That also goes with our present position.

Marcus was investigating two things: A violation of 1084 of Title 18, a gambling violation, and an alleged violation of the FCC regulation.

This grand jury is also investigating a violation of the FCC laws and also another gambling violation of Title 18. This happens to be Section 1952.

Now, clearly, if we grant this particular witness immunity from prosecution for any testimony elicited from him in connection with the inquiries of the FCC violation, he is certainly cloaked from further prosecution under Sec- [fol. 70] tion 1952; indeed, for even income tax violations, as the Marcus and Brown cases went on to say. The immunity is that broad, as far as those particular answers elicited from him.

The Court: It would be true if the grand jury were investigating violations of the Communications Act alone. Personally that is true.

Now, you say that in the Marcus case they were also investigating something else?

Mr. Maloney: That is correct, your Honor. If your Honor would just give me one moment, I can read to you the exact language given by the attorney.

On page 147, your Honor—does your Honor have it before you?

The Court: Yes.

Mr. Maloney: On the third paragraph on the righthand side there was a quote of Mr. Corey, who was the prosecutor there, in which he said to the Court:

"The grand jury is inquiring into violations under Statute 18 U.S.C. 1084 under the transmission of interstate wagering information; also under the Federal Communications Act, if I haven't already mentioned it."

This is rather identical with our position here, your Honor.

The Court: The Court goes on to say in the next sentence:

"The nature of the questions themselves which Marcus refused to answer plainly shows the unlawful use of the telephone communication in connection with gambling and racketeering which is involved."

[fol. 71] Now, the very first question—I think it was the very first question you asked Mr. Harris yesterday in the grand jury minutes was, "Were you engaged in a crap game in Miami?"

Mr. Maloney: That is correct, your Honor, and I am not asking for a direction to that particular question, but I thereafter went on to ask him concerning the background of a certain phone call, an unlawful phone call, to promote a gambling establishment.

Those questions, I feel now, fall under the purview of the FCC regulations, just as they did in Marcus. In Marcus that was a joint inquiry. There had to be an overlapping of questions involving 1084 as well as the Federal Communications Act, but in any event—that's the focal point of the whole issue before this Court—in any event, your Honor, once he is granted immunity under the FCC laws, he can no longer be touched by any prosecutor for a violation, the same violation of 1952.

The grand jury, as I say, has made an extraordinary exception to Mr. Harris. I don't see how he is prejudiced. I think he is in a rather tenuous position because now he has been given every privilege the Government has given, and always bear in mind, your Honor, it is the citizen's duty to come forward and help the Government.

The Court: The only question, Mr. Maloney, is what obviously you can accomplish through Mr. Harris as in fact you accomplished by the procedure you adopted. I understand that you intend to give him immunity, but I want to be very sure that he gets it before I direct him to answer.

Mr. Polakoff: And I think we have to be sure, your Honor, that both the U. S. Attorney and the grand jury have the authority to grant immunity. They cannot sub-[fol. 72] poena any witness for any crime and grant him immunity unless the statute specifically gives him that authority.

Now, may I make a suggestion to your Honor, in view of the fine research your Honor has done? It is my humble opinion that this is an investigation of a dice game or crap game, and the other arguments are just added for the purpose of ensnaring this defendant.

May I suggest that the U. S. Attorney present to your Honor—not to me—the grand jury minutes? There is no secrecy as far as your Honor is concerned, and I am sure that your Honor will then be in a much better position to judge what this investigation is about, what questions were put to other witnesses and what their testimony was.

Mr. Maloney: I have no particular objection to giving them to your Honor, the testimony of the relevant witnesses to this very issue before the Court. I will be happy to do so.

Mr. Polakoff: I suggest the testimony before this grand jury concerning this investigation, not what the Assistant thinks is relevant or not. Your Honor might disagree with him; I might disagree with him.

Mr. Maloney: Your Honor, might I also state this to the Court—and this is rather overwhelming hornbook law, and I can give your Honor dozens of citations, one in this circuit of only a year old, *U. S.* v. *Levine,* which sets forth that the defendant—the witness and his counsel have no standing whatsoever to inquire into the nature of the proceedings before the grand jury, or to the relevancy of certain questions that are to be elicited from his client. He has no standing whatsoever. The cases are very clear on that, Levine being the most recent one.

The Court: I don't think he is asking that.

[fol. 73] Mr. Polakoff: That's right.

Mr. Maloney: He is asking, your Honor, to find out whether this is in fact an FCC investigation or interstate gambling violation. I have said for the record that it is both, and that as far as his client's rights are concerned here, he has every protection afforded by the law once I have said that on the record and once I have established a basis for it in the grand jury, which I believe I have.

The Court: Why would you say that you wouldn't ask him that question again about his being—

Mr. Maloney: That, taken out of context, as it was, the very first question that was asked was a general question that could be strictly for the 1952 violation, but once I went into the wire questions and the purpose of the wire communication, then I was moving into the FCC area, just as I am sure in the Marcus case there had to be an overlapping between 1084 gambling violation and the FCC wire violation. It is impossible to separate the two completely.

The Court: Well, this is what I will do. As I said before, I am sure that the United States Attorney wants to give this witness immunity for some reason, but I have considerable doubt as to whether you have done it by the procedure that you have followed to date, so I will not direct the witness to answer these questions on the present record. I think you are going to have to start over again, Mr. Maloney. I think you ought to give him a subpoena which has a reference to an investigation of violations of the Communications Act, if that is what the grand jury is investigating, and I think that the questions that you ask him to lay a foundation for such a proceeding as this ought to be questions involving the use of the telephone and not just the general questions about was he in crap game.

[fol. 74] Now, when you do that, you will then bring yourself much closer within the rule of these two cases, and the only question remaining then will be whether or not the fact that you tell me the grand jury is also investigating some other crime is sufficient to prevent the rule of these two cases from applying.

Now, you say that it doesn't make any difference that they are investigating some other crime, and you point to Marcus but, as I read to you, although they said that in Marcus, they said in the very next breath that the questions relating to the Communications Act, and I also call your attention to the fact that in *Brown* v. *United States,* which is the case on which you primarily rely, where the statute involved was interstate trucking, the Court is careful to say that it is conceded that the questions were relevant to the grand jury's inquiry.

Now, I would think that if you lay a proper foundation you would then have only this one question that we need concern ourselves.

If you were investigating solely the Communications Act violations, there wouldn't be any doubt in my mind but that he had immunity.

Mr. Polakoff: I wouldn't question it.

The Court: I don't think Mr. Polakoff would contest it, but if you lay a proper foundation and if Mr. Polakoff wants to raise the question as to whether these cases apply, in view of the statement that some other statute is also under investigation, that will give him an opportunity to make that argument.

Mr. Maloney: I might say the Government doesn't completely agree with your Honor, but I will take your Honor's advice, and might I say that in view of your Honor's statements that we end the proceedings right now I will start from scratch, as it were.

[fol. 75] The Court: You will start from scratch, and Mr. Polakoff in the meantime can read some more law and see if he wants to make an issue of that one point, but that is the only point I see in the case.

Mr. Polakoff: Well, I want to thank your Honor personally on behalf of my client for the research you have done and for the interest you have shown in protecting his rights. I don't know whether I will agree with you or not, but if I don't it will be most respectfully, your Honor.

The Court: It often happens that one lawyer or the other disagrees, and sometimes both.

Now, I will not be in 318 after this week, but I am perfectly willing to carry this along with me next week.

Mr. Maloney: Yes, your Honor.

The Court: To avoid the necessity of burdening some other judge with it. I assume you are going to serve the subpoena and go through some more foundation.

Mr. Maloney: Yes, your Honor.

The Court: And then you can bring it up to me in chambers next week if you like.

Mr. Maloney: Yes, sir.

Mr. Polakoff: I have no objection to continuing the case before your Honor.

The Court: All right.

Mr. Polakoff: Now, your Honor, will the subpoena be served forthwith? There is no grand jury in session. I think the subpoena should be served. Whether he has the right to serve it in the courtroom or not, I don't know. I will waive that.

The Court: He hasn't got one in his pocket.

Mr. Maloney: No, I don't.

The Court: Because he didn't realize I was going to make him do it.

[fol. 76] Mr. Polakoff: Will you want to serve it—

Mr. Maloney: If your Honor please, I would want to serve it personally.

Mr. Polakoff: All right, go right ahead then.

Mr. Maloney: If counsel is agreeable, I will have it typed rather than cause the Government expense.

Mr. Polakoff: If you will make it next week, so in the meantime I have a chance to prepare myself.

Mr. Maloney: The subpoena will be served at the convenience of the grand jury, sir, and as soon as I can get it served.

Mr. Polakoff: Now, look, you are talking to an ex-Assistant who was chief of the Criminal Division at one time.

Mr. Maloney: I am not personal, sir, I am doing what my duty requires me to do.

The Court: You gentlemen work that out between you. I will be available next week if you want to bring this up to me again. After next week I won't. I am going away.

We stand adjourned now.

Mr. Maloney, here is your old subpoena. You may want that back.

[fol. 77] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—v.—

AL HARRIS, Appellant.

Excerpts from Appendix for the United States of America

[fol. 78]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 CR 664

U. S. A.,

vs.

AL HARRIS.

MINUTE RECORD OF COURT CLERK RELATING TO CONTEMPT PROCEEDINGS—August 8, 1963

Pres. Hon. Edward C. McLean, *D. J.*

The Court meets and is opened by proclamation.

Crime	Cosenza
Room 1505	Rptr. Cy Lubow

For the Govt.—Andrew J. Maloney, A.U.S.A.

For the Deft.—Moses Polakoff, Esq.

Contempt Proceedings begun.

Government's Testimony

Margaret T. Connelly—sworn.

Government's Exhibits

lid Grand Jury notes of M. T. Connelly taken at hearing before the Grand Jury this day, 8 Aug. 1963.

Al Harris—sworn

The Court adjudges that the defendant is in Contempt of Court and Sentences him to One Year at a place of confinement to be designated by the Attorney General of the U.S. Bail pending appeal fixed at $10,000. Remanded.
Proceedings concluded.
Court stands adjourned.

[fol. 79]

Transcript of Hearing Before Judge McLean and the Grand Jury—July 31, 1963

Witness: Margaret T. Connoly

Re: John Doe

(Room #1401)

MARGARET T. CONNOLY, having been sworn by the Deputy Forelady, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please?
A. Margaret T. Connoly. (spells)
Q. By whom are you employed?
A. United States Attorney's Office, Southern District of New York.
Q. In what capacity?
A. As a Grand Jury Reporter.
Q. Were you present this morning for the minutes of Mr. Harris before this Grand Jury?
A. Yes, sir, for the minutes.

Mr. Maloney: Would you please mark this Grand Jury Exhibit #1 of this date? (So marked.)

Q. I show you what has been marked Grand Jury Exhibit #1, and I ask you can you identify it?

A. Yes.

Q. What is it?

A. These are stenographic notes which I took at the Grand Jury hearing of Al Harris conducted by Mr. Maloney, Assistant United States Attorney.

Q. Would you please read those minutes?

(Witness reads minutes, Exhibit #1.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Maloney: If Your Honor please, it's the government's position that the phone call by Manarite to New York, while on its face it was a legitimate phone call for [fol. 80] lease of premises was really an illegitimate phone call for the purpose of promoting an unlawful activity, a dice game, in Florida, on these premises. And it's the government's position that Mr. Manarite was either in the employ or a co-conspirator of Mr. Harris, and therefore we feel that Mr. Harris comes under the immunity provision of the Federal Communications Act.

Judge McLean: What about those other questions you asked him?

Mr. Maloney: The immunity would also attach, of course, to any answer elicited after immunity had been granted, and it was merely to find out who were the other employers or partners of Mr. Manarite, who made this unlawful telephone call.

Judge McLean: You asked him something about was he in a dice game in Florida: did that have anything to do with the use of a telephone?

Mr. Maloney: That first question, I would not ask Your Honor to expect him to answer that first question I asked, but the other questions subject to a telephone call I would ask, because they would spell out the full scheme here, behind the leasing of this premises.

Judge McLean: It would involve further use of the telephone?

A. Well, it may have, Your Honor; we don't know at this point. But we do know there had to be a plan, once Mr. Manarite made the two telephone calls to Flushing, New

York, to lease these premises. We feel that Mr. Harris was in the employ of the others, and that Mr. Manarite was proceeding at Mr. Harris' or other partners' direction, and therefore we were finding out the purposes of the phone call, in an effort to find out who were the associates of Mr. Manarite or Mr. Harris.

[fol. 81] Judge McLean: Well, I would give that man a chance to have counsel, and argue this out. I have some doubt for the moment as to whether some of these questions are relevant to the statute that you're proceeding on. You can't very well expect him to get counsel in five minutes. Have him come in and tell him that, and we'll fix a date for some time tomorrow. The Grand Jury is going to be here all week, I take it?

Mr. Maloney: Yes, Your Honor, they are.

Judge McLean: Have him come in.

(Witness is recalled.)

Judge McLean: Mr. Harris, they've read to me the transcript of what transpired here this morning when you were being questioned, and I note that you say you want to have counsel, and I think you're entitled to have counsel. Now, can you get a lawyer by tomorrow morning, if you leave here now?

Witness: I think I should be able to; I'll try my best.

Judge McLean: Now, if we set this down for two o'clock tomorrow, Mr. Maloney, we can go into the argument part of it and the Grand Jury will still be available Friday morning?

Mr. Maloney: That's correct, Your Honor.

Judge McLean: And the Grand Jury's presence will not be necessary during this legal argument, so far as I can see. Do you want them there?

Mr. Maloney: I'd hesitate to have them there at two o'clock, Your Honor. I'm not certain whether or not they have to be present. I'd like some opportunity to check it.

Judge McLean: Well, if they are to be present, we'll [fol. 82] set it for some time in the morning, about noon. I have a hearing on tomorrow morning, and I'll go either way you say.

Mr. Maloney: All I can suggest, Your Honor, is that Mr. Harris have his attorney contact me tomorrow morning, and by that time I should know. And I'll contact Your Honor's chambers as soon as I can, whether or not the Grand Jury has to be present, and by that time we can make arrangements for tomorrow morning, or Friday morning.

Judge McLean: I don't see myself why they have to be there to listen to lawyers argue.

Mr. Maloney: I'm inclined to agree with you, Your Honor. I'll have to check and find out.

Judge McLean: Mr. Harris, you go away now. You can leave now,—make any calls you like; get a lawyer here tomorrow morning. Now, we'll have to let you know a little later whether it's going to be at twelve o'clock or two o'clock, but you can certainly get some lawyer by tomorrow, and you can get a chance to discuss with him the problem. Did you understand what the problem is?

Witness: Not thoroughly.

Judge McLean: I can appreciate that. But you get a good lawyer now, and discuss it with him, and I'll hear you tomorrow, and I'll hear the Assistant United States Attorney, and I'll make a decision as to whether you have to answer any questions or whether you don't. That's as far as I can go today, isn't it?

Mr. Maloney: That is correct, Your Honor.

Judge McLean: And you'll let me know tomorrow whether you'll come in at twelve o'clock or at two?

[fol. 83] Mr. Maloney: Yes, Your Honor.

Witness: How'll I know?

Mr. Maloney: Wait outside.

(Witness leaves room.)

Grand Jury Minutes—July 31, 1963

AL HARRIS, called as a witness, and having been duly sworn by the Deputy Forelady of the Grand Jury, testified as follows:

By Mr. Maloney:

Q. Would you state and spell your name for the record, please.

A. Al Harris. (spelled).

Q. Now, Mr. Harris, before proceeding further, let me inform you that this Grand Jury is inquiring into violations of Title 47, United States Code, Section 501, 203(c) which is, namely, violations of the Federal Communications Act, and also into alleged violations of Title 18, United States Code, Section 1952. Let me also advise you you have a constitutional right not to answer any of my questions if you feel the answers might incriminate you. Do you understand that?

A. I do.

Q. Did you attend a dice game in Florida, February of 1963?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Harris, do you know a John Manarite, M-a-n-a-r-i-t-e?

A. I refuse to answer on the grounds it may tend to incriminate me.

[fol. 84] Mr. Maloney: Madam Foreman, would you direct him to answer that last question.

Forelady: You are directed to answer the last question.

The Witness: I don't understand.

Q. The last question was, do you know John Manarite, M-a-n-a-r-i-t-e?

A. I refuse to answer; it may tend to incriminate me.

Q. Well, let me advise you, Mr. Harris, that because this is a proceeding involving violations of Federal Communications Act that where you are directed to answer questions your privilege no longer applies since you are given immunity under Section 409(1) of Title 47, United States Code,

and, therefore, you must answer the questions. Do you understand that?

A. I don't. I would like to have counsel.

Q. Well, shall we proceed a little further? Do you know whether or not Mr. Manarite made a phone call to Flushing, New York, some time in January of 1963 in order to lease a premises for a dice game in Florida?

A. I refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Madam Foreman, would you direct him to answer that last question.

Forelady: You are directed to answer that last question.

The Witness: I don't understand.

Q. You don't understand the question?

A. I understand the question but I don't want to answer because it may tend to incriminate me.

[fol. 85] Q. Were you a partner in the dice game in Florida located at 194-40 North East 26th Street, Ojus, Florida, in February of this year?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: Madam Foreman, will you direct him to answer that last question.

Forelady: You are directed to answer the last question.

The Witness: Can I have counsel?

Q. You may consult with counsel when you are given an opportunity to in a few minutes but do you refuse to answer that last question?

A. I refuse to answer on grounds it may tend to incriminate me.

Q. Now, Mr. Witness, was Mr. Carmine Trumanti a partner of yours in that dice game?

A. I refuse to answer on grounds it may tend to incriminate me.

Mr. Maloney: Would you direct him to answer that last question, Madam Foreman?

Forelady: You are directed to answer the last question.

The Witness: I refuse to answer on the grounds it may tend to incriminate me.

Mr. Maloney: You may step outside and consult with your attorney, sir.

Witness leaves room and is recalled.

Q. Mr. Harris, you are reminded you are still under oath. What is the name of your attorney?

A. I want to get an attorney.

[fol. 86] Q. Didn't you have one here when you were here last week?

A. No.

Q. You had a week to appear back here, have you not?

A. Yes.

Mr. Maloney: Will you, Madam Foreman, direct this witness to wait outside.

Forelady: You're instructed to wait outside.

Witness leaves room.

[fol. 87]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

MOTION TO STRIKE AND EXPUNGE CERTAIN MATTER, ETC.—Filed April 3, 1964

Sir:

Please Take Notice that upon the annexed affidavit of Daniel H. Greenberg, sworn to April 3rd, 1964, the appellant will move this court at Room 1705, United States Court House, Foley Square, New York 7, New York, on the 7th day of April, 1964 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking and expunging from the appendix for the

United States of America pages therein designated 1a, 2a and 3a on the ground that the material contained in said pages did not form part of the proceedings in the court below and do not form official records which the court can otherwise notice judicially, and for such other and further relief as to the court may seem just and proper.

Dated: New York, New York, April 3rd, 1964.

Yours, etc.

Moses Polakoff, Attorney for Appellant, Office & P.O. Address, 475 Fifth Avenue, New York 17, N.Y.

To: Robert M. Morgenthau, Esq., United States Court House, Foley Square, New York.

[fol. 88] ATTACHMENT TO MOTION

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—against—

AL HARRIS, Appellant.

State of New York,
County of New York, ss.:

Daniel H. Greenberg, being duly sworn, deposes and says: I am associate of counsel with Moses Polakoff, the attorney for the appellant herein. I am fully familiar with all of the facts of this case, and in particular with the matters to be discussed hereinafter. This affidavit is submitted in support of appellant's motion to strike and expunge from the appendix filed by the appellee, pages 1a, 2a and 3a. For the convenience of the court, these pages contain the following information:

1a. Minute record of court clerk relating to contempt proceedings.

2a and 3a. Pertinent provisions of American Telephone and Telegraph Long Lines Tariff.

Apart from appellant's self serving characterization of the contents of these pages, it is respectfully submitted that they form no part of the record of this case before the District Court and are not matters which can properly be noticed judicially by this court.

[fol. 89] With respect to the contents of 1a, labeled "Minute Record of Court Clerk relating to Contempt Proceedings", it is respectfully submitted that material appearing on said page is not and was not part of the record of the proceedings in the court below. In his appendix, appellant reproduced in full the docket entries of this case. Nowhere does it appear that the material contained in page 1a of appellee's appendix is identical with the material contained in the docket. The sole purpose of printing this material, it would seem, is to attempt to create an inference that the proceedings before Judge McLean in the District Court were open to the public by a statement that the court meets and is opened by proclamation. Counsel for appellant, Moses Polakoff, was present in court during the entire proceedings before Judge McLean, except that portion of the Grand Jury proceedings when both Judge McLean and Mr. Polakoff left the room. The proceeding was a Grand Jury proceeding and the record of this score is quite clear. Appellant's appendix contains everything that happened before Judge McLean and the Grand Jury on August 8th, 1963.

In an effort to track down the material reproduced by appellee at page 1 of its appendix, I went to the office of the District Court clerk on April 1, 1964 and asked to see the original from which this page was printed. The clerk in the file room refused to show it to me stating to me that it was not a public record, but was merely only an internal administrative record maintained by the clerk for his own use. When I called the printed page 1a to the attention of the person in the file room, I was referred to Mr. Ward, [fol. 90] the deputy clerk in charge of the file and I thereafter had a conversation with Mr. Ward concerning this matter. Mr. Ward stated to me that he had a personal vivid recollection of this particular matter because representatives of the United States attorney's office had asked to see this record and he refused to show it to them. There-

after, upon orders from the front office of the District Court clerk's office, he was directed to furnish this paper. He was then asked to certify it, which he refused to do stating it was not a filed document and therefore not subject to, or capable of being certified. He then permitted it to be taken from his possession by a requisition directed to the office of the clerk of the Court of Appeals. He then stated to me that he no longer had the paper in his possession, and in view of the fact that he had been required to show it to the United States attorney's representative, he was willing to show it to me but he was unable to do so for the foregoing reason.

I thereupon went to the office of the clerk of this court. I had previously checked the record on appeal in this case and did not find the paper reflecting this entry in the files. It was on my return trip to the clerk's office of this court that I brought to the attention of Mr. Fusaro this entire situation. Mr. Fusaro thereupon obtained the files of this case in this court and the paper which Mr. Ward told me had been requisitioned to this court's clerk's office was not among the papers on file.

In any event, it is respectfully submitted that this paper does not properly constitute a matter which should be set forth in an appendix to appellee's brief in this court. It was [fol. 91] not a part of the record in the court below; it forms no part of the record on appeal of this case; it was never shown to counsel for appellant at any time. If this paper is permitted to remain in the record on appeal herein, and if this case is hereafter reviewed by the Supreme Court of the United States, under the present circumstances, the clerk of this court would be required to certify this paper as a proper part of appellee's appendix to the Supreme Court. In so doing, that court would be caused to believe that this paper is a true part of the record of this proceeding in this court.

I respectfully submit it is not part of the proceedings of this case and should be ordered stricken and expunged for the foregoing reasons.

With respect to the so called "Pertinent Provisions of American Telephone and Telegraph Long Lines Tariff", it is respectfully submitted that this characterization is im-

proper and unwarranted. Moreover, this document was not before the court below, does not constitute an exhibit of this proceeding and is not a proper part of appellee's appendix. It is to be noted that during the course of the proceedings in the court below, appellant's counsel repeatedly urged the court that the government produce any rule, regulation or tariff which it claimed was pertinent to this proceeding. The government failed to do so there. What the government has now reproduced at pages 2a and 3a of its appendix, is an extract from a tariff published by the Telephone Company. It is in no way an official record nor a matter which this court could notice judicially. The [fol. 92] failure to produce any rule, regulation or tariff in the court below prevented appellant's counsel from raising any question based upon the relevancy, materiality or legality of the alleged tariff. Moreover, the failure to produce the entire tariff would seem to me to be indicative of the improper inclusion of said material as part of appellee's appendix.

It is to be noted that the two attorneys representing the government in this particular appeal had no part of the proceedings in the court below.

Wherefore, it is respectfully moved that appellant's motion be granted in all respects.

Daniel H. Greenberg

Sworn to before me this 3rd day of April, 1964.

Jean R. Sankowsky, Commissioner of Deeds, City of N. Y., N. Y. County Clk's #4-496, Commission Expires April 17, 1964.

[fol. 93] [File endorsement omitted]

Motion denied.

J.E.L., L.P.M., J.J.S., U.S.C. JJ.

August 26, 1964

[fol. 94]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394—September Term, 1963

Argued April 7, 1964

Docket No. 28524

UNITED STATES OF AMERICA, Appellee,

—v.—

AL HARRIS, Appellant.

Before: Lumbard, Chief Judge, Moore and Smith, Circuit Judges.

Appeal from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York, Edward C. McLean, J., sitting without a jury.

Affirmed.

Neal J. Hurwitz, Assistant U. S. Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and John E. Sprizzo, Assistant U. S. Attorney, New York, N. Y., on the brief), for appellee.

[fol. 95] Moses Polakoff, New York, N. Y. (Daniel H. Greenberg, New York, N. Y., on the brief), for appellant.

OPINION—July 22, 1964

LUMBARD, Chief Judge:

Al Harris appeals from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York arising out of his refusal to answer certain questions put to him before a grand jury in the Southern District on the ground that

he might thereby incriminate himself. We agree with the district court that inasmuch as Harris received immunity for his testimony pursuant to the provisions of the Federal Communications Act, his refusal to answer constituted contempt of court.

Harris was summoned to appear before the grand jury by a subpoena returnable on August 7, 1963.[1] The subpoena stated that the grand jury was investigating alleged violations of the Federal Communications Act, 47 U. S. C. §§203, 501. On that date, Harris appeared and stated his name but declined to answer any of the other questions propounded to him, which concerned a telephone call from Florida to New York City for the purpose of promoting [fol. 96] an illegal dice game in Florida. Later that morning, the grand jury and the government's counsel appeared before Judge McLean in the presence of Harris and his attorney. After hearing argument, Judge McLean directed the parties to appear before him again the following morning. At that time, he directed Harris to answer the questions put to him, on the ground that he had received immunity under the provisions of the Communications Act, 47 U. S. C. §409(l), and therefore could not incriminate himself by answering. When Harris once again refused to answer, the grand jury and the government's counsel again appeared before Judge McLean to ask his assistance. Judge McLean directed Harris to take the witness stand, when Harris again refused to answer, adjudged Harris in

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[1] Harris first appeared before the grand jury on July 31, 1963, pursuant to a subpoena which stated that the grand jury was investigating possible violations of the general conspiracy statute, 18 U. S. C. §371. Harris refused to answer the questions propounded to him, although the government's counsel advised him that the Federal Communications Act, 47 U. S. C. §409(l), afforded him immunity. Later that day the grand jury and the government's counsel appeared before Judge McLean, who, after a reading of the record of the grand jury's proceedings, directed that Harris appear again the following morning. At that time Judge McLean heard argument on whether §409(l) afforded Harris immunity. At Judge McLean's suggestion that the government lay a proper foundation for the grant of immunity, the subpoena here in question was issued stating that the grand jury was investigating possible violations of the Federal Communications Act.

propounded the same questions to him once more, and, criminal contempt and sentenced him to one year's imprisonment. From this judgment and sentence Harris appeals.

Harris relies principally on the claim that the grand jury was in fact investigating alleged violations of the Anti-Racketeering Act, 18 U. S. C. §1952, rather than alleged violations of the Communications Act. Inasmuch as the anti-racketeering statute makes no provision for the grant of immunity to a prospective witness, as does the Communications Act, Harris maintains that no immunity attached to him, and he could therefore not constitutionally be compelled to testify under penalty of contempt of court. We do not agree.

In its investigation of possible violations of the Federal Communications Act, the grand jury may well unearth evidence of violations of other criminal provisions as well. But the likelihood of such a development provides no support for Harris' position. If the statutory provision under which the grand jury is proceeding extends immunity to the prospective witness, that immunity extends to all testi- [fol. 97] mony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision. See *Heike* v. *United States,* 227 U. S. 131, 142-43 (1913). Moreover, the witness compelled to testify in a federal grand jury enjoys immunity as well from the use of that testimony by the prosecutorial agencies of state governments. *Murphy* v. *Waterfront Commission of New York Harbor,* United States Supreme Court, No. 138 October Term, 1963, June 15, 1964. Thus the fact that his testimony may be relevant not only to the specific provision upon which the grand jury's investigation is based but as well to other criminal provisions poses no dilemma for the prospective witness. The crucial question, therefore, is whether the specific immunity provision of the Communications Act was applicable to Harris' questioning.

Section 409(l) of Title 47 of the United States Code extends immunity for testimony given "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [the Federal Communica-

tions Act]." Harris contends that he should have been granted the right to summon several witnesses, including one or two members of the grand jury, to establish that the grand jury's investigation did not pertain to alleged violations of the Communications Act. We do not agree. The extent in general to which a witness may inquire into the subject matter of a grand jury investigation is severely circumscribed, in light of the secrecy in which grand jury proceedings have traditionally been held. *United States* v. *Levine*, 267 F. 2d 335, 336-37 (2 Cir. 1959). See *Blair* v. *United States*, 250 U. S. 273 (1919). In any event, we find that the government sufficiently established that the grand jury's investigation fell within the confines of §409(l).

First, the August 7 subpoena explicitly stated that the grand jury was engaged in investigation of possible vio- [fol. 98] lations of provisions of the Communications Act. Second, the government's counsel represented to the court that the grand jury was investigating possible violations of the Communications Act. Finally, the questions themselves revealed a substantial link with those sections of the Communications Act which prohibit any person from causing a telephone company to violate any provision of the Act. Cf. *In re Bart*, 304 F. 2d 631, 637 (D. C. Cir. 1962).

Harris maintains that under no circumstances could the activities inquired into in the grand jury have constituted a violation of the Communications Act. Rather, he suggests, these activities could at best have constituted violations of the general anti-racketeering statute, 18 U. S. C. §1952. In support of its own position the government weaves the following argument: The Federal Communications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U. S. C. §§203, 501. The tariff of the American Telephone & Telegraph Company, joined in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall "not be used for an unlawful purpose." Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the government here proffers. *Marcus* v. *United States,* 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U. S. 944 (1963). See also *United States* v. *Testa,* 326 F. 2d 730 (3 Cir.), cert. denied, 32 U. S. L. Week 3297 (Feb. 24, 1964). Moreover, the [fol. 99] government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investigation here is a proceeding "based upon or growing out of [an] alleged violation of [the Federal Communications Act]."

We also find no merit in Harris' claim of procedural irregularities in the adjudication of his contempt and in his sentencing. Contrary to his charges, the record establishes that the contempt proceeding was conducted in open court. Moreover, Judge McLean did not err in treating Harris' refusal to answer the questions after court direction to do so as a summary contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States,* 359 U. S. 41 (1959); *Levine* v. *United States,* 362 U. S. 610 (1960). Accordingly, we affirm the judgment of conviction of the district court.

We note that some members of the United States Supreme Court indicated their view, in a footnote to *United States* v. *Barnett,* 376 U. S. 681, 695 n. 12 (1964), that punishment of a criminal contempt by summary trial without a jury would be constitutionally limited to that penalty

provided for petty offenses. Inasmuch as the Court explicitly regarded this statement as *dictum*, and inasmuch as Harris' contempt was committed in the presence of the [fol. 100] court and the contempt proceeding was undertaken prior to compliance with the court's order, in both of which respects this case differs from *Barnett*, we uphold the power of the district judge to impose a sentence of one year's imprisonment, although such a sentence is in excess of that provided for petty offenses. 18 U. S. C. §1. See *Levine* v. *United States*, 362 U. S. 610 (1960); *Brown* v. *United States*, 359 U. S. 41 (1959).

The judgment of the district court is affirmed.

[fol. 101]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

AL HARRIS, Defendant-Appellant.

JUDGMENT—July 22, 1964

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 102] [File endorsement omitted]

[fol. 103]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND GRANTING MOTION TO STAY THE MANDATE—August 25, 1964

Moses Polakoff, New York, N. Y., for appellant.

The petition for rehearing is denied.

The motion to stay the mandate is granted on the terms and conditions provided in Rule 28(c) of the Rules of this Court.

J. E. L., L. P. M., J. J. S., U.S.C. JJ.

[fol. 104] [File endorsement omitted]

[fol. 105]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING AND GRANTING MOTION TO STAY THE MANDATE—Filed August 26, 1964

A petition for a rehearing together with a motion for a stay of the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for appellant,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and hereby is denied.

Further ordered that the motion to stay the issuance of the mandate be and it hereby is granted subject to the provisions of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 106] [File endorsement omitted]

[fol. 107]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING
IN BANC—August 25, 1964

Moses Polakoff, New York, N. Y., for appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 108] [File endorsement omitted]

[fol. 109]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Hon. Robert P. Anderson, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING
IN BANC—Filed August 26, 1964

A petition for a rehearing in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 110] [File endorsement omitted]

[fol. 111]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-four.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING MOTION TO EXPUNGE, ETC.—August 26, 1964

A motion having been made herein by counsel for appellant to expunge certain material from appellee's appendix,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk, By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 112] [File endorsement omitted]

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 114]

SUPREME COURT OF THE UNITED STATES

No. 526—October Term, 1964

AL HARRIS, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 14, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions 2, 3 and 4 presented by the petition which read as follows:

"2. Whether petitioner was offered a proper and fair hearing for criminal contempt under Rule 42 (a) Federal Rules of Criminal Procedure and whether Brown v. United States, 359 U.S. 41 should be reconsidered and overruled by this Court.

"3. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

"4. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.